

DECISION



21705 *21762*
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

118325

FILE: U-205588

DATE: May 6, 1982

MATTER OF: Dillingham Construction Co., Inc.

DIGEST:

Grantee properly canceled solicitation--after bid opening--pursuant to Attachment "O" to Office of Management and Budget Circular A-102, which provides that solicitation may be canceled if "sound business reasons" exist, where record indicates that solicitation specifications needed to be revised in order to provide for informed bidding and to reduce likelihood of future claims litigation.

Dillingham Construction Co., Inc. (Dillingham), has filed a complaint with our Office regarding the cancellation--after bid opening--of a solicitation for construction of a floodwater structure in North Carolina. The solicitation was canceled by the Dutchman Creek Watershed Improvement District (District), Mocksville, North Carolina, which is a grantee of the Department of Agriculture (Agriculture), Soil Conservation Service. The District canceled the solicitation in order to revise certain specifications. Dillingham, the apparent low bidder under the solicitation, contends that there was no "cogent, compelling, reasonable or sound business reason" for rejection of all bids and that the grantee's intent was to avoid an award to Dillingham because the District and Dillingham are litigating claims concerning a prior District construction project.

We deny Dillingham's complaint.

We note that Dillingham's original complaint to our Office was that the District was requiring an unreasonable amount of information to prove that Dillingham was responsible and that the District had imposed an arbitrary 10-day deadline for the submission of this information which, according to Dillingham, was not readily available. However, a responsibility

determination was never made because the District subsequently canceled the solicitation.

Dillingham was determined to be the apparent low bidder for the project on November 4, 1981, the date of bid opening. Soon thereafter, on November 10, the District decided to evaluate Dillingham's responsibility. During its evaluation, which included meetings and direct discussions with representatives of Dillingham, the District states it raised certain concerns regarding the specifications. These concerns centered on the earthfill specifications for the structure; tolerance requirements for all excavation and earth placement; responsibility for damage to the structure prior to final acceptance caused by possible storm water overflow; and possible changed conditions developing between the date of the prebid site inspection and the date construction would begin.

The District believed that failure to clarify or resolve these issues prior to signing a contract could result in future claims if the contract was awarded under the existing specifications. Therefore, the District requested Agriculture's guidance as to how to proceed. Agriculture properly pointed out that negotiation of changes in the solicitation with Dillingham would be improper under an advertised procurement and that the grantee had two alternatives: to proceed with the award under the solicitation without further written clarification or to reject all bids and readvertise with a revised bid package that addressed the concerns in question. Agriculture did state that, in its opinion, the "present specifications and contract documents were adequate to proceed with award" since they had been "used successfully on a national basis on numerous occasions"; however, since the contract was to be "locally awarded," the final decision rested with the grantee. Agriculture also noted that under either alternative the grantee was financially and legally responsible for any claims that might arise.

The District decided to cancel the solicitation and asserts its decision was justified. It states that the site conditions had changed during the months after bid opening, that Dillingham, Agriculture, and the grantee all disagreed on the proper interpretation of certain specifications, and that it did not want to risk costly and time-consuming legal action to resolve issues which, in its view, should be resolved prior to contract award.

The District has submitted proposed construction specification revisions for a new solicitation. Some of the changes concern embankment construction, surface grading instructions, and regrowth in previously cleared areas. The District has also specified the responsibility for damage to work prior to final acceptance by the contracting officer and added a provision with regard to claims not otherwise covered by the changes and differing site conditions clauses of the solicitation.

Attachment "O" to Office of Management and Budget (OMB) Circular A-102 states that for a formally advertised procurement:

"* * * Any or all bids may be rejected when there are sound documented business reasons in the best interest of the program."

Thus, this statement constitutes the sole measure of the propriety of the cancellation. Cf. Premier Electrical Construction Company, B-201981.2, February 1, 1982, 82-1 CPD 71, where, in response to a bidder's contention that it was improperly excluded from a grantee's procurement, we denied the complaint because the grantee had complied with the minimum requirements of Attachment "O."

Based on our review of the record, we cannot question the grantee's position that there were "sound business reasons" for canceling the solicitation.

Dillingham admits that certain specifications involving embankment and grading directly relate to standard Agriculture contract specifications which Dillingham has made the subject of claims. These claims are for work performed for the District and another watershed district under prior awards. In Dillingham's view, this indicates that the District did not want to award to Dillingham because of these claims. In our view, however, these claims raise the issue of the adequacy of the original solicitation specifications.

For example, one claim involved "compliance [with, and] interpretation of, the embankment specifications." The District's revised specification changes the standard specification in this area. Another example is

Dillingham's claim for additional compensation because, on the prior contract, which did not stipulate "slope tolerances," the District directed use of slope tolerances of ± 2 feet which allegedly required extra work in placing earthfill. In its claim, Dillingham states ± 5 -foot tolerance would have been appropriate. The District's proposed specification expressly stipulates slope tolerances. Further, the District reports site condition changes due to storm water and the removal of timber from the site. As a result, the grantee has made additional revisions and additions to the specifications and states it will offer another site visit with the intent of eliminating the concerns it had with regard to the first solicitation.

Agriculture has taken the position that, from the perspective of its national experience, the specifications were adequate. However, the grantee's local claims experience with Dillingham and the site condition changes reasonably prompted concern with these specifications notwithstanding the national experience. Therefore, this national experience does not undercut the soundness of the grantee's cancellation decision.

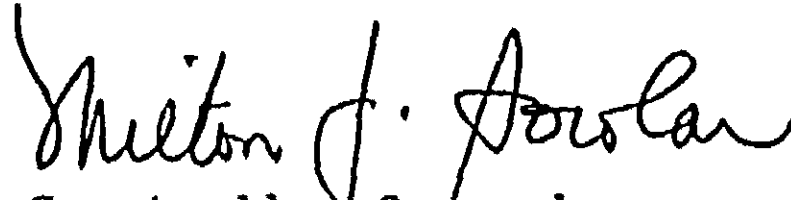
In view of these circumstances, we cannot question the District's view that sound business reasons required the revision of these standard specifications for purposes of informed bidding and reducing the likelihood of future claims litigation.

However, based on this record, we do note that the District may or should have known about most of these potential specification problems prior to issuing the original solicitation since the Dillingham claims were initially filed in 1979. Therefore, it is regrettable that the District did not make appropriate changes to the specifications before releasing the solicitation. The District did not do so perhaps because of the erroneous assumption that it could negotiate any needed specification revisions with the low bidder prior to award. In any event, we trust that the District will strive to prevent a repetition of these circumstances in the future.

We deny Dillingham's complaint.

Dillingham has requested compensation for loss of anticipated profits and bid preparation expenses. However, since we find the cancellation of the solicitation was reasonable, we need not address the issue of whether a disappointed bidder on a Federal

grantee procurement can recover bid preparation costs. See Brumm Construction Company, B-201613, October 6, 1981, 81-2 CPD 280. In any event, there is no legal basis for allowing any unsuccessful bidder to recover anticipated profits, even if the claimant is wrongfully denied a contract. The Eagle Construction Company, B-191498, March 5, 1979, 79-1 CPD 144.



Acting Comptroller General
of the United States